No.

In the Supreme Court of the United States

OCTOBER TERM, 1992

FEDERAL DEPOSIT INSURANCE CORPORATION

v.

JOHN H. MEYER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

1. Whether the Federal Savings and Loan Insurance Corporation (FSLIC), a federal agency, may be held liable for tort damages arising out of an alleged violation of due process pursuant to a right of action implied under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

2. Whether FSLIC, acting as receiver for an insolvent banking institution, violated the Due Process Clause by terminating the employment of an officer of the failed institution without affording any opportunity for a hearing.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Robert Pattullo was a defendant in the district court and appellee in the court of appeals.

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The Solicitor General, on behalf of the Federal Deposit Insurance Corporation, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The decision of the court of appeals (App., *infra*, 1a-34a) is reported at 944 F.2d 562.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 1991. A petition for rehearing was denied on June 29, 1992. On September 22, 1992, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including October 27, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides: "nor shall any person * * * be deprived of life, liberty, or property, without due process of law." The pertinent statutory provisions are reprinted in an appendix to this petition. App., *infra*, 37a-39a.

STATEMENT

Respondent was an officer of a thrift institution that was placed under federal receivership after it became insolvent. In order to protect the public, FSLIC receivers are given broad discretion to summarily replace the management of failed institutions placed in receivership. After respondent's employment was terminated without a hearing, he brought this damage action challenging the constitutionality of FSLIC's practice.

1. On April 13, 1982,[1] the Federal Home Loan Bank Board appointed the Federal Savings and Loan Insurance Corporation (FSLIC) as federal receiver for an insolvent California thrift institution, Fidelity Savings and Loan. See 12 U.S.C. 1729(c)(2) (1982).[2]

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[1] The court of appeals erred in stating that the receivership began on April 13, 1983. App., *infra*, 2a & n.1. See Supp. C.A. Rec. Exc. 10 (Complaint); *id.* at 89-90 (joint statement of stipulated facts).

[2] Under 12 U.S.C. 1729(b)(1)(A) (1982), when FSLIC was appointed receiver of an insolvent financial institution, it was charged with the responsibility

> (i) to take over the assets of and operate [the insolvent] institution;

FSLIC designated Robert Pattullo to serve as its special representative with responsibility for the receivership. App., *infra*, 2a-3a. On the first day of the federal receivership, Mr. Pattullo terminated the employment of four top officials of Fidelity, including respondent, without affording them any opportunity to contest the decision. At the time of his termination, respondent was Executive Vice President of Fidelity and his brother was President. Respondent had been an employee of Fidelity for 16 years. App., *infra*, 2a; C.A. Supp. Rec. Exc. 10. Respondent was responsible for branch operations of Fidelity. He was

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> (ii) to take such action as may be necessary to put it in a sound solvent condition;
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> (iii) to merge it with another insured institution;
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> (iv) to organize a new Federal association to take over its assets;
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> (v) to proceed to liquidate its assets in an orderly manner; or
>
> (vi) to make such other disposition of the matter as it deems appropriate;
>
> whichever it deems to be in the best interest of the association, its savers, and the Corporation * * *.

The Federal Deposit Insurance Corporation (FDIC) has comparable responsibilities when serving as receiver under current law. See 12 U.S.C. 1821, 1822, 1823 (Supp. II 1990) (FDIC). That authority was "designed to give the FDIC power to take all actions necessary to resolve the problems posed by a financial institution in default." H.R. Rep. No. 54(I), 101st Cong., 1st Sess. Pt. 1, at 330 (1989). Under 12 U.S.C. 1441a(b)(4), RTC has "the same powers and rights to carry out its duties with respect to" institutions placed in its receivership "as the [FDIC]," with certain exceptions not pertinent here.

not responsible for the loan practices that caused Fidelity's insolvency. C.A. Supp. Rec. Exc. 88.

2. Approximately one year after termination of his employment, respondent filed an action for damages under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against Fidelity, FSLIC, and Pattullo. Respondent alleged that under California law, he had a right not to be terminated from long-term and permanent employment absent good cause, and that FSLIC lacked good cause to terminate his employment. The complaint alleged that FSLIC's and Pattullo's termination of his employment without affording him any hearing constituted a deprivation of a state-created property interest without due process of law, in violation of the Fifth Amendment. C.A. Supp. Rec. Exc. 13-14. In addition, the complaint alleged that the United States was liable under the Federal Tort Claims Act (FTCA) for tortious breach of respondent's implied employment contract and implied covenant of good faith and fair dealing. C.A. Supp. Rec. Exc. 15.

Prior to trial, the district court held that respondent's action against the United States was barred both by the discretionary function exception to the FTCA, 28 U.S.C. 2680(a), and by the FTCA exception for claims "arising out of * * * interference with contract rights," 28 U.S.C. 2680(h). However, the court denied motions to dismiss the action against FSLIC and Pattullo, and the *Bivens* claims against those defendants were accordingly tried before a jury.

The jury found FSLIC liable to respondent in the amount of $130,000. By special verdict, the jury

concluded that respondent had "a legitimate claim of entitlement to employment or a reasonable expectation of continued employment arising out of an implied contract with Fidelity" and that FSLIC "fail[ed] to provide [respondent] a hearing, the reasons for his discharge, and an opportunity to contest the reasons for his discharge before his termination." C.A. Rec. Exc. 63-64. In addition, the jury concluded that this violation of due process damaged respondent in the amount of $130,000, which represented losses suffered "as a result of [respondent's] discharge from employment." C.A. Rec. Exc. 64. The jury found that Pattullo was entitled to the defense of qualified immunity because he had acted in good faith. App., *infra*, 3a-4a; C.A. Rec. Exc. 64.

3. The court of appeals affirmed. The court rejected arguments by FDIC, which had been substituted for FSLIC,[3] that the court lacked authority to award tort damages against a federal agency under *Bivens* and that FSLIC had not violated respondent's constitutional rights.

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[3] As a result of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, FSLIC was abolished. FDIC has replaced FSLIC as receiver for Fidelity and was substituted for FSLIC as defendant in this suit. See FIRREA § 401(f)(2), 12 U.S.C. 1437 note (Supp. II 1990). Under FIRREA, either FDIC or the Resolution Trust Corporation (RTC) may be appointed as receiver for an insolvent institution, depending on the circumstances. The authority of FDIC and RTC as receivers is similar to, but generally broader than, that exercised by FSLIC in this case. See 12 U.S.C. 1821(d), 1821(e) (Supp. II 1990) (FDIC).

a. The court of appeals concluded that *Bivens* provides a damages remedy for constitutional deprivations of due process committed by federal agencies with statutory authority to "sue and be sued."[4] First, the court rejected the argument that the FTCA barred creation of a *Bivens* remedy here. Although the FTCA provides that "[t]he authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title," 28 U.S.C. 2679(a), the court concluded that a claim arising out of a constitutional violation is not "cognizable" under Section 1346(b). App., *infra*, 4a-20a. The court reasoned that only suits based upon violations of state law are "cognizable" because 28 U.S.C. 1346(b) only provides a remedy "for injury or loss of property * * * under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." See App., *infra*, 37a. The court acknowledged that at least some tort claims on which the FTCA does not permit recovery are viewed as "cognizable" for purposes of Section 2679(a). But the court limited that category to claims that are controlled by what it termed "explicit" exclusions, such as the provisions denominated "exceptions" in 28 U.S.C. 2680. App., *infra*, 8a-9a.

[4] See 12 U.S.C. 1725(c)(4) (1982). The charters of both FDIC and RTC include sue-and-be-sued clauses. See 12 U.S.C. 1819 Fourth (FDIC); 12 U.S.C. 1441a(b)(10)(F) (Supp. II 1990) (RTC).

Second, having concluded that it was legally irrelevant that Congress did not permit recovery under the FTCA for the constitutional tort alleged in this case, the court found that FSLIC's sue-and-be-sued clause should be read to permit an award of damages pursuant to a cause of action implied under the Constitution. In the court's view, that clause represented a "general waiver of sovereign immunity" sufficient to extend to respondent's claim for damages under *Bivens*. App., *infra*, 5a.

b. The court also concluded that the termination of respondent's employment without a hearing violated due process. App., *infra*, 21a-28a. The court reasoned that California law provided respondent with a property interest in employment absent good cause for termination. App., *infra*, 22a-23a. The court rejected FDIC's argument that any such property interest under state law was negated by controlling federal regulations and the statutory scheme governing bank receiverships, which permitted FSLIC to terminate indefinite employment contracts without a hearing. Those laws provided FSLIC with "power to * * * [r]eject or repudiate any lease or contract which it considers burdensome," 12 C.F.R. 569a.6(c)(3) (1982),[5] defined any employment contract for an "excessive term" as a forbidden "unsafe and unsound practice," 12 C.F.R. 563.39 (1982), and permitted FSLIC broad authority to operate, reorganize, merge, or liquidate insolvent institutions, see note 2, *supra*. The court nevertheless held that "[t]he fact that

[5] The power of FDIC and RTC to repudiate contracts is now codified at 12 U.S.C. 1821(e)(1) (Supp. II 1990) (FDIC); 12 U.S.C. 1441a(b)(4) (Supp. II 1990) (RTC).

federal and, arguably, state law conferred wide discretion to receivers to repudiate 'burdensome' contracts does not, retrospectively, annul the state entitlement." App., *infra*, 26a.[6] It accordingly held that the federal receiver's right to "dispose expeditiously of burdensome contracts" did not absolve FSLIC of its constitutional duty to provide Meyer with "an opportunity to be heard" on the question whether his state law implied contract should be repudiated. App., *infra*, 28a.

REASONS FOR GRANTING THE PETITION

In 1971, this Court held in *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, that the Constitution vested federal courts with authority to recognize an implied cause of action for damages against federal officials who have deliberately engaged in unconstitutional conduct. For the first 20 years after *Bivens* was decided, no appellate court ever held that the remedy recognized in *Bivens* could be expanded to provide a cause of action directly against a federal agency. In this case, however, the court of appeals has concluded that any

[6] The court also distinguished cases in which it had rejected procedural due process challenges by employees dismissed by the Federal Reserve Board and the Federal Home Loan Bank. See *Bollow* v. *Federal Reserve Bank*, 650 F.2d 1093, 1098-1101 (9th Cir. 1981), cert. denied, 455 U.S. 948 (1982); *Inglis* v. *Feinerman*, 701 F.2d 97 (9th Cir. 1983), cert. denied, 464 U.S. 1040 (1984). The court held that, although the analogy to those cases was "seductive," App., *infra*, 24a, it failed because Fidelity, prior to its takeover, was a state-chartered savings institution, rather than a federal bank created pursuant to federal statutes.

agency with authority to "sue and be sued" is subject to damages for constitutional violations under *Bivens*. The court reached this result even though the same claim, if pled under state law tort principles, would be barred by the Federal Tort Claims Act. This holding circumvents the limitations on tort remedies Congress established in the FTCA, conflicts with decisions of other courts of appeals, and portends an unwarranted expansion of litigation against federal agencies. Accordingly, review by this Court is warranted.

The court of appeals' holding that FSLIC's conduct violated the Constitution likewise merits this Court's review. By holding that due process requires federal receivers to provide employees with hearings concerning cause for their removal, the decision threatens to undermine their ability to act swiftly and efficiently to handle the affairs of insolvent banks with the least possible risk to federal insurance funds and to the public's confidence in our banking system. In the last six years, federal receivers have assumed control of more than 1750 failed financial institutions. Other banks and thrifts will fail as well, but until this decision is overturned, FDIC, RTC and their officials are at risk for damage awards when they seek to summarily replace managers of failed financial institutions in accordance with their authority under federal law. Such unauthorized interference in federal receivers' management of financial institution failures should not be permitted to stand.

1. The court of appeals' unprecedented recognition of a *Bivens* remedy against a federal agency was improper for several related reasons: the FTCA pro-

vides an exclusive remedy for tort damages against FSLIC and other sue-and-be-sued agencies; the authority to "sue and be sued" does not constitute a waiver of sovereign immunity for implied claims under the Constitution; and the court exceeded its authority under *Bivens* by implying a remedy against a federal agency where a variety of factors "counsel[] hesitation." *Bivens*, 403 U.S. at 396.

a. The court fundamentally misinterpreted the role of the FTCA in tort litigation against federal agencies. Courts have repeatedly held that the FTCA provides the exclusive damage remedy for claims that a federal agency caused tortious injuries. See, *e.g.*, *United States* v. *Smith*, 111 S. Ct. 1180 (1991); *Loeffler* v. *Frank*, 486 U.S. 549, 561-562 (1988); *Galvin* v. *OSHA*, 860 F.2d 1281, 1283 (5th Cir. 1980).

In this case, however, the court articulated two reasons for departing from that rule: FSLIC is a sue-and-be-sued agency, and a tort claim arising out of a federal constitutional violation is not "explicitly" barred by the FTCA. Neither factor, however, merits circumvention of the FTCA framework for tort recoveries—a framework that immunizes a variety of important governmental functions, requires administrative exhaustion of claims, precludes jury trials, and prohibits punitive damages.

First, Congress determined that the tort liability of sue-and-be-sued agencies should be coextensive with the tort liability of other federal agencies. See 28 U.S.C. 2679(a). See also S. Rep. No. 1400, 79th Cong., 2d Sess. 33, 34 (1946) ("It is intended that neither corporate status nor 'sue and be sued' clauses shall, alone, be the basis for suits for money recovery

sounding in tort," so as to "place torts of 'suable' agencies of the United States upon precisely the same footing as torts of 'nonsuable' agencies."). The court of appeals' ruling, however, destroys the uniformity Congress chose by creating a supplemental scheme of tort liability for sue-and-be-sued agencies.

Second, claims for constitutional deprivations are "cognizable" under the FTCA—and therefore subject to its limitations—regardless of whether recovery is barred. The FTCA provides that many types of tort claims against federal agencies are not actionable. For example, 28 U.S.C. 2680, entitled "Exceptions," provides that sovereign immunity is not waived for injuries caused by a variety of allegedly tortious acts, such as those arising from performance of a discretionary function, 28 U.S.C. 2680(a). Further, the basic waiver of sovereign immunity set forth in 28 U.S.C. 1346(b) itself excludes several types of tort claims. Strict liability claims—*i.e.*, those claims not "caused by the negligence or wrongful act or omission" of a federal employee—are excluded. See *Dalehite* v. *United States*, 346 U.S. 15, 44-45 (1953); *Laird* v. *Nelms*, 406 U.S. 797, 801 (1972). Claims not caused by a federal employee "while acting within the scope of his office or employment" are excluded. See *Hatahley* v. *United States*, 351 U.S. 173, 180-181 (1956). And claims that do not arise "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred" are excluded.

Plaintiffs have regularly argued that tort claims that may not be brought against a federal agency

under the FTCA are not "cognizable" under the statute, as that term is used in 28 U.S.C. 2679(a). Until this case, courts have uniformly rejected that contention,[7] and this Court recently rejected a precisely analogous contention in *United States* v. *Smith*, 111 S. Ct. 1180, 1185-1186 & n.9 (1991) (provision making FTCA remedy against United States exclusive of remedy against employee applicable even when FTCA bars recovery against United States).

In this case, there is no question that the FTCA would have barred recovery for the injury alleged. If respondent characterized the claim as one for wrongful termination under state law, the discretionary function exception would foreclose recovery; indeed, the district court dismissed respondent's action against the United States on precisely that ground. If respondent instead characterized the claim as one arising out of unconstitutional governmental action, recovery would be barred because a "private person" would not be liable under state law for such conduct. The Ninth Circuit entirely circumvented

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[7] See, *e.g.*, *Taylor* v. *Administrator of the SBA*, 722 F.2d 105 (5th Cir. 1983); *Northridge Bank* v. *Community Eye Care Center, Inc.*, 655 F.2d 832, 834-835 (7th Cir. 1981); *FDIC* v. *Citizens Bank & Trust Co.*, 592 F.2d 364, 371 (7th Cir.), cert. denied, 444 U.S. 829 (1979); *Expeditions Unlimited Aquatic Enters., Inc.* v. *Smithsonian Inst.*, 566 F.2d 289, 296-299 (D.C. Cir. 1977), cert. denied, 438 U.S. 915 (1978); *Safeway Portland Employees Fed. Credit Union* v. *FDIC*, 506 F.2d 1213, 1215 (9th Cir. 1974); *Edelman* v. *FHA*, 382 F.2d 594 (2d Cir. 1967); *Goddard* v. *District of Columbia Redevelopment Land Agency*, 287 F.2d 343, 345-346 & n.3 (D.C. Cir.), cert. denied, 366 U.S. 910 (1961); *Freeling* v. *FDIC*, 221 F. Supp. 955, 956 (W.D. Okla. 1962), aff'd per curiam, 326 F.2d 971 (10th Cir. 1963).

these long-standing requirements by finding that constitutional torts are not "cognizable" under the FTCA.

The court reached its conclusion by distinguishing between claims "explicitly" excluded from the FTCA's coverage by one of the specific provisions of 28 U.S.C. 2680, and claims "implicitly" excluded from the FTCA's coverage by one of the qualifications of the basic waiver provision, 28 U.S.C. 1346(b).[8] This dis-tinction makes no sense, and simply casts a blind eye to the fact that Congress deliberately chose to make a federal agency's tort liability similar to that of "private persons." Moreover, there is no question that Congress contemplated that the FTCA would provide a remedy against federal agencies for a variety of acts that contravened federal constitutional law as well as state law. See, *e.g.*, 28 U.S.C. 2680(h) (providing a damage remedy against the United States for the type of law enforcement conduct found unconstitutional in *Bivens* to the extent permitted by state tort law). There is, accordingly, no basis to disregard the careful limitations Congress placed on damages recovery for such violations of constitutional rights by finding that no constitutional torts are "cognizable" under the Act.

The court of appeals' decision on this issue is not only incorrect, but it also conflicts with decisions of

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[8] The court did not explain whether claims that are excluded on other grounds—for instance, because the claimant failed to submit a timely administrative claim, see 28 U.S.C. 2675(a)—would fall into the "explicit" or "implicit" category.

other circuits.[9] In *Peak* v. *SBA*, 660 F.2d 375 (8th Cir. 1981), the Eighth Circuit held that the FTCA barred a suit against the SBA, a sue-and-be-sued agency, under a state workers' compensation statute that provided for strict liability. The court rejected the argument that, because a strict liability suit is barred by Section 1346(b), it falls outside Section 2679(a)'s exclusive remedy provision and may be brought under the agency's sue-and-be-sued clause itself. 660 F.2d at 377-378. The court made quite clear that the exclusions in Section 1346(b)—"implicit" exclusions, according to the Ninth Circuit in this case—are to be treated no differently from the specific exceptions of Section 2680. As the Eighth Circuit explained, Congress "created the FTCA as a uniform, systematic, and exclusive remedy for the torts of federal agencies" and "if no recovery is allowed under the FTCA for an action sounding in tort, there is simply no remedy afforded." 660 F.2d at 378. The Eighth Circuit's decision in *Peak* is inconsistent with the Ninth Circuit's decision in this case.

The Ninth Circuit's decision is also inconsistent on its facts with *Ascot Dinner Theatre, Ltd.* v. *SBA*, 887 F.2d 1024 (10th Cir. 1989). In *Ascot*, the plaintiff claimed that its First Amendment rights were violated when the SBA denied it a loan guaranty because it engaged in constitutionally protected expression. Citing 28 U.S.C. 2679(a), the court held that "the

[9] The reasoning of the court of appeals is also in substantial tension with this Court's decision in *Smith*, as well as with all of the decisions holding that tort claims excluded from FTCA coverage are nonetheless "cognizable" under the FTCA, see note 7, *supra*.

express authority of any federal agency 'to sue and be sued' does not alter the FTCA as the exclusive remedy for actions sounding in tort." 887 F.2d at 1028. The court held that the action could not be brought under the FTCA, because it fell within the discretionary function exception, see 887 F.2d at 1029, and it could not be brought under the SBA's sue-and-be-sued clause because Section 2679(a) "com-pletely forecloses such a tort recovery." 887 F.2d at 1029.

Ascot demonstrates that the Tenth Circuit does not permit actions for constitutional torts to be brought against sue-and-be-sued agencies, at least where those actions would fall within the FTCA's discretionary function exception. That same principle would require dismissal of this suit. Both *Ascot* and this case involved "constitutional tort" claims, see 887 F.2d at 1028, against sue-and-be-sued agencies. Moreover, there is no doubt that respondent's claim, like the plaintiff's claim in *Ascot*, would be barred by the FTCA's discretionary function exception. See *United States* v. *Gaubert*, 111 S. Ct. 1267 (1991). Accordingly, although the Tenth Circuit did not specifically rely on the private person/local law requirement of Section 1346(b), the Tenth Circuit's result in *Ascot* is inconsistent with the result reached by the Ninth Circuit in this case.[10]

[10] The Ninth Circuit's decision in this case is also in substantial tension with *Contemporary Mission, Inc.* v. *United States Postal Service*, 648 F.2d 97, 105 n.9 (2d Cir. 1981), and *McCollum* v. *Bolger*, 794 F.2d 602, 608 (11th Cir. 1986), cert. denied, 479 U.S. 1034 (1987). In those cases, the Second and Eleventh Circuits relied on 28 U.S.C. 2679(a) and 1346(b) to hold that the Postal Service's sue-and-be-sued clause did not provide a waiver of sovereign immunity for constitutional

b. Even if the FTCA did not provide the exclusive remedy for plaintiff's claim, FDIC's sue-and-be-sued clause would still fail to provide a waiver of sovereign immunity applicable to this action. This Court has explained that Congress subjected federal agencies to sue-and-be-sued clauses in order to "launch[] [such agencies] into the commercial world," *FHA* v. *Burr*, 309 U.S. 242, 245 (1940), and that the liability of such agencies under the clause "is the same as that of any other business." *Franchise Tax Bd* v. *United States Postal Service*, 467 U.S. 512, 520 (1984). Thus, "when Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to 'sue and be sued,' it cannot be lightly assumed that restrictions on that authority are to be implied." *Id.* at 517. Accord *Loeffler* v. *Frank*, 486 U.S. 549, 554-555 (1988). Nonetheless, this Court's decisions have repeatedly

torts. The court of appeals here distinguished those cases and a similar Ninth Circuit case involving the Postal Service, *Pereira* v. *United States Postal Service*, 899 F.2d 861, 864 (9th Cir. 1990), modified, 942 F.2d 577 (1991) and 964 F.2d 873 (1992), on the ground that the Postal Service's governing statute provides that the FTCA "shall apply to tort claims arising out of activities of the Postal Service." See 944 F.2d at 570 (citing 39 U.S.C. 409(c)). We doubt that the distinction is sound, since the statute the court cites merely subjects the Postal Service to the FTCA and would appear to have no effect on the analysis of what claims are "cognizable" under Section 1346(b). Moreover, although the Eleventh Circuit in *McCollum* does advert to the same Postal Service statute, there is nothing in the opinions in *Contemporary Mission* or *McCollum* to suggest that those courts would have applied a different analysis had the case involved a sue-and-be-sued agency other than the Postal Service.

emphasized that a restriction on such a waiver is appropriate when "certain types of suits are not consistent with the statutory or constitutional scheme" or a "restriction * * * is necessary to avoid grave interference with the performance of a governmental function or * * * for other reasons it was plainly the purpose of Congress to use the sue-and-be-sued clause in a narrow sense." *Franchise Tax Bd.*, 467 U.S. at 517-518; see also *Loeffler* v. *Frank*, 486 U.S. at 556-557.

Imposing liability on FSLIC for a constitutional tort claim such as that advanced in this case would not subject FSLIC to liability "the same as that of any other business," *Franchise Tax Bd.*, 467 U.S. at 520, since the Constitution generally does not restrict the conduct of private entities. Cf. *Loeffler* v. *Frank*, 486 U.S. at 557 (permitting interest awards against Postal Service under sue-and-be-sued clause "to the extent that interest is recoverable against a private party as a normal incident of suit"); *Peoples Nat'l. Bank* v. *Meredith*, 812 F.2d 682, 684-685 (11th Cir. 1987); *Queen* v. *TVA*, 689 F.2d 80, 85 (6th Cir. 1982), cert. denied, 460 U.S. 1082 (1983). Instead, by subjecting the federal receiver to liability to which no private party would be subject, it would amount to "grave interference with the performance of [the federal receiver's] governmental function" to resolve quickly and decisively the problems caused by the insolvent institution.[11] Moreover, permitting constitutional tort suits under FSLIC's sue-and-be-sued

[11] See, *e.g.*, *Langley* v. *FDIC*, 484 U.S. 86, 91 (1987); *FDIC* v. *Merchants Nat'l Bank*, 725 F.2d 634, 637-638 (11th Cir. 1984); *FSLIC* v. *Murray*, 853 F.2d 1251, 1256 (5th Cir. 1988).

clause would be "inconsistent" with Congress's decision, in enacting the discretionary function exception, not to subject policy decisions by federal agencies to after-the-fact judicial review via the mechanism of a tort suit. See *United States* v. *Gaubert*, 111 S. Ct. 1267, 1277 (1991). Accordingly, under well-settled principles articulated in this Court's cases, FSLIC's sue-and-be-sued clause is not a waiver of sovereign immunity applicable to constitutional tort claims.

c. Finally, the court of appeals' unprecedented determination that a private plaintiff can bring a *Bivens* action directly against a federal agency is both misguided and unsettling. In *Bivens* itself, this Court held that, despite the absence of specific congressional authorization, an individual who can demonstrate an injury as the consequence of a violation of his Fourth Amendment rights by an individual federal employee may bring a suit for money damages against that employee. In thus implying a private right of action directly from the Constitution in favor of an injured plaintiff, the Court made clear that the action could be brought against the federal employee whose constitutional violation caused the injury, not against the government itself. The Court noted that there were no "special factors counselling hesitation" in implying a cause of action in favor of the plaintiff because the cause of action it recognized did not involve "a question of 'federal fiscal policy.' " 403 U.S. at 396.

This case raises the question whether a court may imply a *Bivens* cause of action when to do so *would* involve "a question of 'federal fiscal policy' " because

a federal agency is the defendant. This Court's opinion in *Bivens* recognized that fact as a "special factor[] counselling hesitation," and nothing in this Court's succeeding cases concerning the circumstances under which a *Bivens* action may be implied cast any doubt on that conclusion. See *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988); *United States* v. *Stanley*, 483 U.S. 669 (1987); *Chappell* v. *Wallace*, 462 U.S. 296 (1983); *Bush* v. *Lucas*, 462 U.S. 367 (1983); *Carlson* v. *Green*, 446 U.S. 14 (1980); *Davis* v. *Passman*, 442 U.S. 228 (1979).

Other factors counsel hesitation as well. As noted above, Congress made clear in enacting the discretionary function exception to the FTCA that it intended to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984); see *United States* v. *Gaubert*, 111 S. Ct. at 1273. That exception specifically precludes suits "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty * * *, whether or not the discretion involved be abused." 28 U.S.C. 2680(a). Indeed, because judicial review in tort suits of administrative (or legislative) policy choices would raise core separation of powers concerns, this Court has noted Congress's belief that "claims of the kind embraced by the * * * exception would have been exempted from the waiver of sovereign immunity by judicial construction" even if Congress had not

included the exception in the FTCA. *Varig Airlines*, 467 U.S. at 810.

FSLIC's action in dismissing respondent is plainly the type of discretionary function that Congress sought to protect from judicial review in tort suits. In *Gaubert*, this Court held that decisions concerning the proper steps to take to preserve a struggling thrift institution prior to its takeover by federal authorities fell within the discretionary function exception. As the Court put it, such decisions "involved the exercise of discretion in furtherance of public policy goals." 111 S. Ct. at 1279. The decisions made by a federal receiver after takeover of an insolvent thrift—including decisions about which employees to terminate and which contracts to repudiate—involve similarly sensitive policy choices and would similarly fall within the discretionary function exception if challenged under the FTCA. The court of appeals' decision to imply a *Bivens* remedy here impermissibly expands judicial review of administrative and legislative policy choices in the face of Congress's express prohibition of such review. Cf. *Schweiker* v. *Chilicky*, 487 U.S. at 428-429.

2. The court of appeals also erred in concluding that FSLIC violated the Due Process Clause when it terminated respondent's employment without a hearing. Respondent did not have a protected property interest, and even if one could be found, the receivership claims process afforded him all the process that would be due.

a. Contrary to the court of appeals' conclusion, respondent did not have a legally protected, state-created property interest in continued employment

after his employer became insolvent and FSLIC was appointed as federal receiver. As this Court has explained, "[p]roperty interests are not created by the Constitution," but instead "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 538 (1985). Where an individual is employed by a federal receiver, however, federal law—not state law—governs the employment relationship and provides whatever property rights the individual may enjoy as a result of his employee status.

When FSLIC was appointed receiver for the insolvent Fidelity Savings and Loan, a sea change occurred in that institution's legal and contractual relationships.[12] Ordinary commercial relationships and contractual obligations between Fidelity and those with whom it did business—relationships previously governed by state law—were substantially altered or, in some cases, invalidated. See, *e.g.*, *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447, 456 (1942). Similarly, ordinary employment relationships were no longer governed by state law. Since respondent's employer was now FSLIC as receiver, respondent's rights arising out of his employment contract became subject to federal, not state, law. See *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979); *United States* v. *Seckinger*, 397 U.S. 203 (1970) (citing cases); *United States* v. *County of Allegheny*, 322 U.S. 174 (1944). Accordingly, respondent retained a

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[12] See *FDIC* v. *Shain, Schaffer & Rafanello*, 944 F.2d 129, 134, 137 (3d Cir. 1991); *Gaff* v. *FDIC*, 919 F.2d 384, 389 (6th Cir. 1990), modified, 933 F.2d 400 (6th Cir. 1991).

right to continued employment after FSLIC was appointed receiver only if federal law recognized that right.

The insurmountable difficulty for respondent is this: Federal law does not recognize such a right. Instead, Congress vested federal receivers with "a broad mandate" to take whatever actions are necessary to reorganize or liquidate an insolvent banking in-stitution. *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561, 580 (1989); see *id.* at 568-572. That mandate necessarily includes a right to terminate bank managment at will—a right that FSLIC and FDIC have regularly exercised in the public interest. See *Gaubert*, 111 S.Ct. 1267 at 1279 (observing that "[w]hen a governmental agency holds such great powers over its offspring, even to the point of appointing a conservator or receiver to replace the management * * *, it is difficult to hold that an informal request, even demand, to clean house would amount to an abuse of the statutory powers and discretion of the agency," quoting *Miami Beach Federal Savings & Loan Ass'n* v. *Callander*, 256 F.2d 410 (5th Cir. 1958)). To recognize a right to continued employment in those circumstances would "frustrate specific objectives of" the federal banking receivership scheme since the very essence of receivership is new managment. *Kimbell Foods*, 440 U.S. at 728. For its part, the court of appeals purported to rely on *FDIC* v. *Mallen*, 486 U.S. 230 (1988), as support for its conclusion that respondent had a property interest in continued employment, *Mallen* does not in any way cast doubt on the conclusion that employees of institutions in receivership do not have the same

property rights that may have attached prior to the receivership.[13] The court of appeals' reliance on a state law property right was accordingly wholly misplaced.

b. Even if respondent's state law rights survived FSLIC's acquisition of the institution, his claim under the Due Process Clause woul fail. FSLIC, like other receivers appointed to wind up the affairs of an insolvent entity, had common law authority to

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[13] In *Mallen*, a bank officer was suspended pursuant to a federal statute requiring suspension of bank officers who are indicted for felonies involving dishonesty or breach of trust. 486 U.S. at 233. The parties did not dispute that the officer's "interest in the right to continue to serve as president of the bank and to participate in the conduct of its affairs is a property right protected by the Fifth Amendment Due Process Clause," a conclusion with which the Court agreed. 486 U.S. at 240. The only issue in the case was whether the procedures afforded the officer in connection with his deprivation of that interest were adequate, and the Court held that they were.

Neither the Court nor the parties in *Mallen* specified the source of law from which the bank officer's property interest arose or the precise scope of that property interest. Insofar as the property interest in *Mallen* arose from federal law, it provides no support for the court of appeals' conclusion; creation of such a right in the circumstances of this case would be fundamentally inconsistent with controlling principles of federal law. But even if the officer's property interest in *Mallen* arose from state law, the circumstances in *Mallen* were entirely different from those in this case. FDIC in *Mallen* was not functioning as receiver for the bank, it was not responsible for paying the salaries of the bank employees, and it was not responsible for selling or liquidating the institution as soon as possible.

repudiate contracts.[14] See 12 C.F.R. 569a.6(c)(3) (1982). Due process in such situations requires only that a party injured by such a repudiation have the opportunity to submit a claim—not to demand specific performance—that will be paid in accordance with whatever reasonable priorities are fixed by law.[15] Thus, even if respondent could find a valid source of law for his right to continued employment by FSLIC, his dismissal reduced that right to a claim against the estate, for which he was entitled to receive payment in accordance with priorities set by law. See 12 U.S.C. 1729(d) (1982); 12 C.F.R. 569a.7-569a.9 (1982). See generally *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561 (1989). Since he was not deprived

[14] See, *e.g.*, *Erie Malleable Co.* v. *Standard Parts Co.*, 299 F. 82, 85-86 (6th Cir. 1924); *Greenblatt* v. *Ottley*, 430 N.Y.S.2d 958, 963 (Sup. Ct. 1980); *Riker* v. *Browne*, 204 N.Y.S.2d 60, 62 (Sup. Ct. 1960); *Rosenbaum* v. *United States Credit-System Co.*, 40 A. 591, 593 (N.J. Ct. Error and App. 1898); *Birmingham Trust & Sav. Co.* v. *Atlanta B & A Ry.*, 271 F. 731, 738 (N.D. Ga. 1921). Some courts have held that upon appointment of a receiver, employment contracts terminate as a matter of law. See *Wade* v. *Mutual Bldg. & Loan Ass'n*, 145 S.E. 18, 19 (N.C. 1928); *People* v. *Globe Mut. Life Ins. Co.*, 91 N.Y. 174, 179-180 (1883); *Ely* v. *Van Kannel Revolving Door Co.*, 184 F. 459, 462 (C.C. E.D.N.Y. 1911); *Lenoir* v. *Linville Improvement Co.*, 36 S.E. 185, 188 (N.C. 1900). The Bankruptcy Code gives a bankruptcy trustee authority to repudiate the debtor's contracts. See 11 U.S.C. 365(a) (bankruptcy trustee may "reject any executory contract"), 1113 (collective bargaining agreements).

[15] See, *e.g.*, *Kuehner* v. *Irving Trust Co.*, 299 U.S. 445, 451-452 (1937); *Continental Illinois Nat'l Bank & Trust Co.* v. *Chicago Rock Island & Pacific Ry.*, 294 U.S. 648, 680-681 (1935); *Hanover Nat'l Bank* v. *Moyses*, 186 U.S. 181, 192 (1902).

of his claim, if any, against the estate, he was deprived of no property interest recognized by the Due Process Clause.

4. The court of appeals' decision threatens dramatic interference with this nation's efforts to deal with failed financial institutions. Since its inception in August 1989, the Resolution Trust Corporation (RTC) has been appointed receiver of more than 650 thrift institutions. Since 1986, FDIC has been appointed receiver for more than 1100 financial institutions. Even if limited to its effect on FDIC and RTC, the court of appeals' decision permits any individual whose contractual or other state-law property rights are affected by those receiverships to sue the federal receiver for money damages for violations of a procedural due process right. This Court has observed that FDIC and RTC often have to act "with great speed, usually overnight, in order to preserve the going concern value of the failed bank and avoid an interruption in banking services." *Langley* v. *FDIC*, 484 U.S. 86, 91 (1987). The court of appeals' decision poses a serious threat to their ability to resolve the problems caused by insolvent financial institutions, at a potentially enormous cost to the federal fisc and the public's confidence in the banking system.

The court of appeals' decision also dramatically expands the exposure of numerous other sue-and-be-sued agencies to tort liability.[16] As the wrongful

[16] Among the government agencies whose charters contain sue-and-be-sued clauses are the SBA, see 15 U.S.C. 634(b)(1), the Export-Import Bank of the United States, 12 U.S.C. 635, the Farm Credit Administration, see 12 U.S.C. 2013(4), the Student Loan Marketing Association, 15 U.S.C. 2289(1), the

termination turned "due process" claim at issue in this case illustrates, a litany of tort claims can readily be recharacterized as constitutional torts so as to circumvent all of the carefully crafted limitations of the FTCA. Under the court of appeals' rationale, plaintiffs bringing such claims will not be required to pursue administrative claims, they can obtain punitive damages, they are entitled to jury trials, and most of all, they can obtain recovery where the FTCA would bar it. In this way, a plaintiff can compel federal compensation for policy decisions, intentional torts, or any other type of agency action, so long as his injury could be pleaded in the language of the constitution. Because Congress has never authorized such suits, further review is warranted.

Commodity Credit Corporation, 20 U.S.C. 1087-2(i)(1), the Overseas Private Investment Corporation, 22 U.S.C. 2199(d), and the Pension Benefit Guaranty Corporation, 29 U.S.C. 1302(b)(1). Other agencies' charters include sue-and-be-sued clauses limited to the administration of specific programs. See 20 U.S.C. 1082(a) (Department of Education); 42 U.S.C. 404a (Depart-ment of Housing and Urban Development).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 89-16695, 90-15025

JOHN H. MEYER, PLAINTIFF/APPELLANT
CROSS-APPELLEE

v.

FIDELITY SAVINGS, ET AL., DEFENDANTS
AND
FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, DEFENDANT-APPELLEE/
CROSS-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Filed Apr. 5, 1991]

BEFORE TANG, FARRIS AND D.W. NELSON, CIRCUIT JUDGES

D.W. NELSON, CIRCUIT JUDGE:

With the enactment of the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-80, Congress partially punctured the immunity of the sovereign. At the same time, however, it limited the relief available

against parties other than the government by making the United States the exclusive defendant in various situations. This case presents one of the numberless questions arising out of this interplay: Whether a suit predicated on the tortious deprivation of fifth amendment due process, and therefore arguably beyond the reach of the FTCA, may nonetheless be brought against the Federal Savings and Loan Insurance Corporation ("FSLIC") pursuant to a "sue-and-be-sued" clause. We hold that it may.

I.

In 1966, plaintiff John Meyer ("Meyer") joined Fidelity Savings & Loan ("Fidelity"), where he remained for the ensuing sixteen years. By 1982, at the time he was terminated, he had reached the position of executive vice-president. That same year, as a result of dubious loan policies, Fidelity began experiencing severe financial difficulties. They finally came to a head on April 13, 1983, when California's Savings and Loan Commissioner seized Fidelity's assets and appointed the (FSLIC) as state receiver. Because the FSLIC was later appointed the sole federal receiver by the Federal Home Loan Bank Board pursuant to 12 U.S.C. § 1729(c)(2), federal receivership replaced state receivership by operation of law.[1] Also on April 13, Robert Pattullo ("Pattullo")

[1] On April 13, 1983, the FSLIC as receiver and the newly created federally chartered Fidelity Savings & Loan ("Fidelity Federal") executed an "Acquisition Agreement," whereby they purchased virtually all of Fidelity's assets and assumed practically all of its liabilities. The following day, the FSLIC acquired all remaining assets and undertook to pay all remaining liabilities.

was named as the FSLIC's special representative to handle Fidelity's receivership. He promptly proceeded to terminate four employees. Among them was Meyer.

No reason was given Meyer for his termination, nor was he provided an opportunity either to hear the reasons why he should, or put forth the reasons why he should not, be terminated. In the same vein, he subsequently was denied the opportunity to appeal the decision or present evidence to challenge it.

Meyer's suit, filed against a number of defendants, grows out of these events. As of the time of trial, the sole remaining claim alleged that the FSLIC's and Pattullo's actions had deprived plaintiff of a property interest without due process of law, in violation of the Fifth Amendment.[2] The FSLIC's argument that it was protected by the doctrine of sovereign immunity having been rejected by the United States magistrate presiding over the trial,[3] the trial proceeded before a jury.

Subsequently, on September 28, 1982, the FSLIC in both its corporate and receivership capacities transferred the assets and liabilities of Fidelity Federal to Citicorp Bank, which in turn transferred the assets and liabilities to its wholly owned subsidiary, Citicorp Savings and Loan.

[2] On January 23, 1985, the district court issued an order dismissing a number of Meyer's claims, including his claim under the Fifth Amendment. However, on December 5, 1986, the court having reconsidered *sua sponte* its previous order, reinstated plaintiff's claim for deprivation of property without due process of law against the FSLIC and Pattullo.

[3] The trial was held before a magistrate pursuant to a stipulation and order entered February 16, 1989.

On September 19, 1989, the jury reached its decision pursuant to a special verdict. It found that Meyer had "a legitimate claim of entitlement to employment or a reasonable expectation of continued employment arising out of an implied contract with Fidelity;" that Meyer was "discharged ... by the FSLIC and/or Robert L. Pattullo;" that the FSLIC and/or Pattullo "failed to provide John Meyer with a hearing, the reasons for his discharge, and an opportunity to contest the reasons for his discharge before his termination;" that Pattullo was "acting within the scope of his employment at the time he terminated plaintiff;" and that Meyer was "damaged as a result of the discharge." Upon instruction challenged by appellant, and after the court had rejected appellant's request that it allow expert testimony on the state of the law at the time of Meyer's termination, the jury also found Pattullo to be "immune from liability under the doctrine of qualified immunity."

The FSLIC timely appealed, arguing that Meyer's claims against the federal agency were barred by sovereign immunity. In the alternative, it disputes the conclusion that Meyer was deprived of a protected property interest. Meyer then filed a cross-appeal on the issue of Pattullo's qualified immunity.[4]

II.

The jurisdictional puzzle presented by this case consists of four principal pieces. First is the funda-

[4] Although the Federal Deposit Insurance Corporation ("FDIC") is the statutory successor to the FSLIC, *see* 12 U.S.C. § 1821(a), this opinion refers to the FSLIC as it was the FSLIC's interest that was litigated throughout the suit.

mental proposition that, "[a]bsent a waiver of sovereign immunity, the Federal Government is immune from suit." *Loeffler* v. *Frank*, 486 U.S. 549, 555, 108 S.Ct. 1965, 1969, 100 L.Ed.2d 549 (1987); see also *United States* v. *Testan*, 424 U.S. 392, 400, 96 S.Ct. 948, 954, 47 L.Ed.2d 114 (1976); *LaBarge* v. *County of Mariposa*, 798 F.2d 364, 366 (9th Cir.1986), *cert. denied*, 481 U.S. 1014, 107 S.Ct. 1889, 95 L.Ed.2d 497 (1987).

Second comes Congress' express provision that the FSLIC may "sue and be sued, complain and defend, in any court of competent jurisdiction in the United States." 12 U.S.C. § 1725(c)(4) (repealed 1989); *see also F.H.A.* v. *Burr*, 309 U.S. 242, 245, 60 S.Ct. 488, 490, 84 L.Ed. 724 (1939) (stating that "such waivers by Congress of governmental immunity in case of such federal instrumentalities should be liberally construed"). We consistently have held that this "sue and be sued" language constitutes a general waiver of sovereign immunity. *Woodbridge Plaza* v. *Bank of Irvine*, 815 F.2d 538, 542-43 (9th Cir. 1987); *Morrison-Knudsen Co., Inc.* v. *Chg Intern., Inc.*, 811 F.2d 1209, 1223 (9th Cir.) ("Unless Congress clearly directs otherwise, such 'sue and be sued' language waives an agency's sovereign immunity"), *cert. dismissed*, 488 U.S. 935, 109 S.Ct. 358, 102 L.Ed.2d 349 (1987).

The third item is the FTCA, 28 U.S.C. §§ 1346(b), 2671-2680. The FTCA waives the United States' sovereign immunity from tort claims "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674; *see also*

Bush v. *Eagle-Picher Indus.*, 927 F.2d 445, 447 (9th Cir.1991).[5]

The fourth and final piece of the puzzle is the FTCA provision that states:

> The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title.

28 U.S.C. § 2679. Construing these four pieces together, our task can be expressed in the following question: Is a claim alleging deprivation of property without due process of law "cognizable" under the FTCA?

If the answer to this question is yes, the sue-and-be-sued clause has no effect on this case, *see* 28 U.S.C. § 2679(a), and Meyer's suit must be dismissed. Where the FTCA governs, its remedy is exclusive and a government agency may not be sued in its own name. *See Loeffler*, 486 U.S. at 549, 108 S. Ct. at 1966. The issue, then, simply becomes whether the FTCA waives the United States' sovereign immunity for the

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[5] In addition, under the FTCA,

> (T)he district courts ... shall have exclusive jurisdiction of civil actions on claims against the United States ... for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b).

particular tort at stake and whether the plaintiff has duly complied with the Act's requirements. Meyer's suit alleges a constitutional tort, which, by definition, is based on federal, not state, law. Because the FTCA restricts its waiver to injuries "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred," 28 U.S.C. § 1346(b), his claim would be barred.[6]

On the other hand, if the tort is *not* "cognizable" under the FTCA, then § 2679(a) has no application in this case and Meyer's suit is authorized by the broad waiver of sovereign immunity embodied in the sue-and-be-sued provision. *See Woodbridge Plaza*, 815 F.2d at 542-43; *Morrison-Knudsen*, 811 F.2d at 1223.

In deciding whether a claim is or is not cognizable, courts appear to have established three broad categories. First, claims brought against sue-and-be-sued agencies that clearly fall under the FTCA's coverage—that is, for which the FTCA provides a cause of action—are cognizable under section 1346(b). As a consequence, the remedy provided by the FTCA is exclusive. That result derives directly from section 2679(a) and the Supreme Court's opinion in *Loeffler*, where it stated:

> Congress expressly limited the waivers of sovereign immunity that it had previously effected through "sue-and-be-sued" clauses and stated that, in the context of suits for which it

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[6] If this case is governed by the FTCA, other obstacles stand in Meyer's way. For instance, he would have had to bring his action against the United States and meet the administrative exhaustion requirements.

> provided a cause of action under the FTCA, "sue-and-be-sued" agencies would be subject to suit only to the same extent as agencies whose sovereign immunity from tort suits was being waived for the first time.

486 U.S. at 562, 108 S.Ct. at 1973.

Second, claims against sue-and-be-sued agencies that do not sound in tort, and therefore escape the FTCA's ambit, are unaffected by section 2679(a). That much is clear from *Loeffler*, in which the Supreme Court held that limitations on a sue-and-be-sued waiver of sovereign immunity must be "expressly" created by Congress. 486 U.S. at 561, 108 S.Ct. at 1972. The waiver of sovereign immunity, in sum, is left intact as to non-tort causes of action. *See also Woodbridge*, 815 F.2d at 543-44 (holding that where a claim is not "within the exclusive purview of the FTCA . . . the 'sue-and-be-sued' provision" remains available to waive the agency's sovereign immunity) (citing *Franchise Tax Board* v. *United States Postal Service*, 467 U.S. 512, 104 S.Ct. 2549, 81 L.Ed.2d 446 (1984)).

In the third hypothetical lies the real brain teaser. These are hybrid cases where the claim sounds in tort but is excluded from the FTCA's coverage. They fall into two subgroups: explicitly excluded claims, and implicitly excluded claims. The question in both instances is whether the fact that the FTCA does notprovide a remedy means that the action is not cognizable under the Act.

For actions controlled by an *explicit* exclusion, the answer is clear. Claims labeled "exceptions" by 28

U.S.C. § 2680 are one such example.[7] Such claims, which would appear to be embraced by the FTCA's definition of torts for which the government has waived its immunity but which are specifically excepted pursuant to section 2680, are not actionable. They are, however, deemed "cognizable" under the FTCA. *Safeway Portland Employees Fed. Credit Union* v. *FDIC*, 506 F.2d 1213, 1215 (9th Cir.1974). Therefore, pursuant to section 2679, a sue-and-be-sued clause would *not* waive an agency's immunity as to such actions.[8]

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[7] Thus, the FTCA "shall not apply to . . . [a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter . . . [a]ny claim for damages caused by the imposition or establishment of a quarantaine by the United States . . . [a]ny claim arising in a foreign country . . . ." 28 U.S.C. § 2680(k).

[8] We find support for this position in a recent Supreme Court decision. At issue in *United States* v. *Smith*, — U.S. —, 111 S.Ct. 1180, 113 L.Ed.2d 134 (1991), was the interplay between the Federal Employees Liability Reform and Tort Compensation Act of 1988 ("Liability Reform Act") and the FTCA. Under section 5 of the Liability Reform Act, "[t]he remedy against the United States" pursuant to the FTCA "is exclusive of any other civil action or proceeding for money damages . . . ." 28 U.S.C. § 2679(b)(1). In a sense, section 2679(b)(1) is thus the counterpart, as applied to federal employees, of section 2679's exclusivity provision directed at "sue-and-be-sued" agencies.

The problem in *Smith* was that the FTCA did not provide a remedy against the government because the alleged injury had occurred abroad and section 2680(k) of the FTCA specifically precludes recovery in such instances. The question, therefore, was "whether, by designating the FTCA as the 'exclusive remedy,' § 5 precludes an alternative method of recovery

The other, more difficult example concerns claims that sound in tort but are *implicitly* excluded from the FTCA's waiver of sovereign immunity. This is the case with torts for which state law would not impose liability on private persons, such as constitutional torts. Because "the constitutional tort is a child of federal law, the United States is not liable for such torts under the Federal Tort Claims Act." Bell, *Proposed Amendment to the Federal Tort Claims Act*, 16 Harv.J. on Legis. 1, 4 (1979); *see also Pereira* v. *United States Postal Service*, 899 F.2d 861, 864 (9th Cir.1990); *Keene Corp.* v. *United States*, 700 F.2d 836, 845 n. 13 (2d Cir.), *cert. denied*, 464 U.S. 864, 104 S. Ct. 195, 78 L.Ed.2d 171 (1983); *Birnbaum* v. *United States*, 588 F.2d 319, 322 (2d Cir.1978); Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 Sup. Ct. Rev. 281, 356. *See generally* Dolan, *Constitutional Torts and the Federal Tort Claims Act*, 14 U.Richmond L.Rev. 281 (1980). We conclude, for the reasons that follow, that constitutional torts, in addition to being implicitly excluded from the FTCA, are also not cognizable under that statute.

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against a government employee in cases where the FTCA itself does not provide a means of recovery." 111 S.Ct. at 1185.

Reversing our court's prior holding, the Supreme Court held that "§ 5 makes the FTCA the exclusive mode of recovery for the tort of a Government employee even when the FTCA itself precludes Government liability." *Id.* In reaching this decision, the Court relied on statutory language addressed to the federal employee prong of § 2679 that is absent from its federal agency equivalent. Indeed, section 2679(d)(4) expressly provides that suit "shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and *shall be subject to the limitations and exceptions applicable to those actions.*" 28 U.S.C. § 2679(d)(4) (emphasis added); *see also* 111 S.Ct. at 1185. Still, we are persuaded by the reasoning of the Supreme Court and by the holdings of various sister courts that suits predicated on tortious acts specifically excluded from the ambit of the FTCA cannot be brought against a federal agency, the existence of a sue-and-be-sued provision notwithstanding.

The Seventh Circuit's exchange on this issue is most illuminating. In *Baker* v. *F & F Investment Company*, 489 F.2d 829 (7th Cir. 1973), African-Americans brought a suit alleging violation of their Fifth and Thirteenth amendment rights by federal agencies, including the FSLIC. The defendants' argument that the FTCA applied and did not grant a remedy to the plaintiffs was characterized as both "elaborate" and "inherently suspect" by the court. *Id.* at 834-35. The Seventh Circuit proceeded to hold that subject matter jurisdiction existed for two reasons. First, addressing the issue of what we have called implicitly excluded claims, the court held:

> Plaintiffs' claim against these defendants is based on federal law. The complaint does not allege, and the federal defendants do not concede, that the United States, if a private person, would be liable to plaintiffs in accordance with Illinois law. Since the complaint is based exclusively on federal law, the FTCA is inapplicable . . . [T]he attempt to vindicate a right dependent, as here, upon federal statutes is not within the ambit of the FTCA.

Id. at 835.

Second, the court defeated the defendants' argument that the suit, being in reality a suit for tortious

interference with contractual rights, was explicitly barred by 28 U.S.C. § 2680(h).[9] The court simply replicated its prior reasoning, stating that if this were "really a suit for interference with contract rights, then the FTCA would 'not apply' and the sue and be sued clauses would not be limited by § 2679(a), and the pre-FTCA consent to sue would not be affected." *Id.* at 836. (citation omitted).

Six years later, the Seventh Circuit reconsidered its *Baker* decision in *FDIC* v. *Citizens Bank & Trust Co.*, 592 F.2d 364 (7th Cir.), *cert. denied*, 444 U.S. 829, 100 S.Ct. 56, 62 L.Ed.2d 37 (1979). That case involved a suit filed against the FDIC for a tort explicitly excluded from the FTCA; it did not involve any implicit exclusions. Reviewing decisions of other courts, the Seventh Circuit found that the FTCA "withdrew the sue-and-be-sued waiver of sovereign immunity" for explicitly excluded torts. *Id.* at 369. As most courts had ruled, even though a claim is labeled an exception under the FTCA, it nonetheless is "cognizable" for purposes of § 1346(b). *Id.* at 370; *see Safeway Portland*, 506 F.2d at 1215; *Edelman* v. *FHA*, 382 F.2d 594, 596-97 (2d Cir.1967). Therefore, it overruled *Baker* on this point.

However, *Citizens Bank* left undisturbed *Baker's* second prong, namely that "because the claim arose under federal law it was not within the ambit of the Act." 592 F.2d at 370. Indeed, it expressly distinguished the facts of the two cases, remarking that "the conduct alleged in *Baker* . . . was not the kind of conduct a private person (see § 1346(b)) would ever

[9] Section 2680(h) provides that the FTCA will not apply to "[a]ny claim arising out of . . . interference with contract rights."

have an opportunity to engage in, which suggests that Congress did not intend the Federal Tort Claims Act to apply." *Id.* at 370 n. 8. In sum, there is a difference, for purposes of "cognizability," between claims explicitly excepted by the FTCA and those implicitly excluded by virtue of the FTCA's own definition—that is, claims where no private person would be liable under the law of the state.[10] The former are "cognizable" under the FTCA, while the latter are not.

Support for this view can be found by comparing *Safeway Portland* with *First Empire Bank* v. *FDIC*, 572 F.2d 1361 (9th Cir.), *cert. denied*, 439 U.S. 919, 99 S.Ct. 293, 58 L.Ed.2d 265 (1978). As mentioned above, in *Safeway Portland*, we found that torts explicitly excluded from the FTCA are "cognizable" under the statute. *Id.* at 1215 (quoting *Edelman*, 382 F.2d at 597). And yet, in *First Empire*, we held the FDIC liable on a claim based on federal law without even mentioning the immunity argument. As noted in *Federal Deposit*, short of surreptitiously overruling *Safeway Portland*, *First Empire* must stand for the position that "a tort claim arising under federal law is not subject to the Act." *Citizens Bank*, 592 F.2d at 372.

Language from a large number of courts corroborates this position. For example, in *Birnbaum*, plaintiffs brought suit alleging that the Central Intelligence Agency ("CIA") had unlawfully opened

[10] This distinction appears to have guided the district court in the instant case. Indeed, although the district court dismissed Meyer's state tort claims because they fell under two exceptions explicitly mentioned in section 2680 of the FTCA, he agreed to hear plaintiff's constitutional allegation.

letters from the Soviet Union. Besides discussing a number of causes of action cognizable under state law, the court scrupulously examined the claim alleging a constitutional violation:

> The District Court also held that the violation of plaintiffs' federal constitutional rights is a separate ground for liability under state law. We do not believe that the Federal Tort Claims Act comprehends *federal constitutional* torts in its reference to the "law of the place" under § 1346(b) . . . .
>
> Since Congress restricted the basis for liability under the Act to the 'law of the place,' we think that it would be a *tour de force* to consider direct violations of the federal constitution as "local law" torts.

588 F.2d at 327-28 (footnote omitted) (emphasis in original); *see also Keene*, 700 F.2d at 845 n. 13 (remarking that "*Bivens*-type actions against the United States are . . . routinely dismissed for lack of subject-matter jurisdiction"). These cases fortify the view that constitutional torts are not cognizable under the FTCA.

The FSLIC asserts that *Pereira* and its forebears[11] stand for the proposition that the sue-and-be-sued language does not waive its immunity for constitutional torts. In *Pereira*, plaintiff brought a First Amendment suit against the United States

[11] *McCollum* v. *Bolger*, 794 F.2d 602 (11th Cir.1986), *cert. denied*, 479 U.S. 1034, 107 S.Ct. 883, 93 L.Ed.2d 836 (1987); *Insurance Co. of N. Am.* v. *United States Postal Serv.*, 675 F.2d 756 (5th Cir.1982); *Contemporary Mission, Inc.* v. *United States Postal Serv.*, 648 F.2d 97 (2d Cir.1981).

Postal Service ("USPS"). 899 F.2d at 862. Holding that the Postal Service was immune from suit despite its sue-and-be-sued clause, we stated:

> The Federal Tort Claims Act . . . provides a waiver of sovereign immunity for tortious acts of an agency's employees only if such torts committed in the employ of a private person would have given rise to liability under state law. Therefore federal district courts have no jurisdiction over the United States where claims allege constitutional torts.
>
> The "sue and be sued" language of the Postal Service's charter should not be interpreted to enlarge the waiver of sovereign immunity specified by the FTCA . . . . [T]he Postal Service cannot be sued for constitutional torts . . .

Id. at 864.

We find *Pereira* inapposite for purposes of the instant case.[12] *Pereira*, as well as the three cases to which it cites on this issue, involved a claim against the (USPS). Like the FSLIC, the USPS is a sue-and-be-sued federal agency; unlike claims against the FSLIC, however, claims against the USPS are

[12] We note that a district court has cited *Pereira* on facts strikingly parallel to our own. In *Rush* v. *FDIC*, 747 F.Supp. 575 (N.D.Cal.1990), plaintiff brought a suit alleging in part that his termination by the FDIC constituted a deprivation of property without due process of law. *Id.* at 576. Dismissing this portion of the plaintiff's claim, the district court held *Pereira* to be dispositive. *Id.* at 579 (holding that "[s]ince plaintiff cannot allege a constitutional tort under the FTCA, the sovereign immunity of the United States and its agencies remains intact").

governed by 39 U.S.C. § 409(c).[13] Section 409(c) provides: "The provisions of chapter 171 and all other provisions of title 28 relating to tort claims shall apply to tort claims arising out of activities of the Postal Service." Its import is to make the FTCA the sole possible avenue of relief for *all* torts committed by the USPS, whether or not the FTCA actually provides a remedy. In other words, section 409(c) has effectively read out tort actions from the general waiver of sovereign immunity embodied in the Postal Service's sue-and-be-sued clause. *See Pereira*, 899 F.2d at 863 (noting that the USPS's sue-and-be-sued waiver of sovereign immunity "is limited with respect to tort claims" by virtue of 39 U.S.C. § 409(c)).

Because the FTCA does not provide a remedy for constitutional torts, the United States has not waived its immunity for such torts when committed by the Postal Service. In light of this limitation on the sue-and-be-sued clause, we could not have found that language to have authorized a suit against the Postal Service for constitutional torts. Congress has enacted no such restriction on the general waiver of the FSLIC's immunity. For that reason, *Pereira* does not control this case.[14]

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[13] Section 409(c) was expressly invoked by all four courts. *See Pereira*, 899 F.2d at 863; *McCollum*, 794 F.2d at 608; *Insurance Co. of N. Am.*, 675 F. 2d at 758; *Contemporary Mission*, 648 F.2d at 104 n. 9.

[14] In fact, *Pereira* does not explicitly refer to section 2679 at all. It is also noteworthy that two of the cases cited by *Pereira* are simply inapposite. In *Insurance Co. of N.Am.*, the court affirmed the dismissal of plaintiff's claim that the Postal Service had negligently lost bags containing currency. 675 F.2d at 757. The court's holding thus stands for the unremarkable proposition that since plaintiff's claim was a strict common-law tort action, subject to the exceptions of the FTCA, and because section 2680(b) states that § 1346 does not apply to "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter," the suit was barred, notwithstanding the sue-and-be-sued clause. *Id.* at 758. The court never mentioned the issue of constitutional torts, nor need it have.

As for the second case, *Contemporary Mission*, the relevant portion of the opinion is limited to a footnote in which it is stated:

> [T]he district court correctly determined that it lacked subject matter jurisdiction over the claims against the United States Postal Service that were based upon certain postal officials' alleged interference with plaintiff's constitutional rights. The waiver of sovereign immunity contained in 28 U.S.C. § 1346(b) (1976) is limited to suits predicated upon a tort cause of action cognizable under state law.

648 F.2d at 104 n. 9. Bereft of any mention of the sue-and-be-sued clause, the statement simply echoes a familiar point, namely that constitutional torts are not embraced by the FTCA's waiver of sovereign immunity. *See supra* at 568.

Nor are we persuaded by the FSLIC's argument that its interpretation best matches congressional intent. First, it cites Congress' wish to "place torts of 'suable' agencies of the United States upon precisely the same footing as torts of 'nonsuable' agencies." H.R.Rep. No. 1287, 79th Cong., 1st Sess., 6 (1945). Because the latter cannot be sued directly for constitutional torts, it argues, nor can the former.

Despite its force, the logic is not failproof. The Supreme Court case interpreting Congress' statement made it clear that "in the context of suits *for*

which it provided a cause of action under the FTCA, 'sue-and-be-sued' agencies would be subject to suit only to the same extent as agencies whose sovereign immunity from tort suits was being waived for the first time." *Loeffler*, 486 U.S. at 562, 108 S.Ct. at 1973 (emphasis added). Congress, in sum, begged the very question raised by this case, namely whether constitutional torts are torts for which Congress "provided a cause of action under the FTCA." Hence, Meyer's view is equally consistent with legislative intent, leaving suable and nonsuable agencies on equal terms whenever, and to the extent that, the FTCA applies.

The FSLIC's second, more powerful retort is to point to the 1988 Liability Reform Act amending the FTCA. As outlined earlier, *see supra* note 8, section 2679 has two prongs: the first is addressed to sue-and-be-sued agencies, § 2679(a); the second to federal employees, § 2679(b). In relevant part, both purport to provide exclusive FTCA remedies against the United States.[15] However, under the amendment, Congress specifically held that federal employees were *not* immunized by section 2679(b) for civil actions "brought for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2)(A). The absence of a comparable restriction under section 2679(a) lends credence to the view that the Act also

[15] Section 2679(a) grants immunity to sue-and-be-sued agencies for claims cognizable under the Act; under section 2679(b), "[t]he remedy against the United States provided by Sections 1346(b) and 2672 of this title ... is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee ...."

precludes constitutional tort suits against sue-and-be-sued agencies.

However, we reject that argument. Besides the fact that interpreting the sounds of legislative silence remains an uncertain science, there is another way of reading Congress' action. As Justice Stevens points out in his *Smith* dissent, section 2679(b)(2)(A) is of questionable usefulness: "Congress did not need to add this amendment ... because ... constitutional torts are, for the most part, outside the realm of common-law torts," *Smith*, 111 S.Ct. at 1193 (Stevens, J., dissenting), and therefore unaffected by the FTCA or its amendments. As a result, it is at least arguable that its inclusion was meant as a reminder, an added guarantee made necessary by the amendment's potential ambiguity on this point.[16]

Moreover, other differences between Congress' treatment of actions against federal agencies and against federal employees should be noted. The provision addressing the former is remarkably suc-

[16] Legislative history is only faintly enlightening. In distinguishing between common law and constitutional torts, the House Committee Report simply explains:

> [T]he term "common law tort" embraces not only those state law causes of action predicated on the "common" or case law of the various states, but also encompasses traditional tort causes of action codified in state statutes that permit recovery for acts of negligence .... It is well established that the FTCA applies to such codified torts .... *A constitutional tort action, on the other hand,* is a vehicle by which an individual may redress an alleged violation of one or more fundamental rights embraced in the Constitution.

H.R.Rep. No. 100-700, p. 6 (1988) (emphasis added).

cinct. As we have seen, it does not mention that constitutional tort suits might still be viable against sue-and-be-sued agencies, *compare* 28 U.S.C. § 2679 (b)(2)(A); but, by the same token, neither does it mention the continued applicability of the FTCA's explicit limitations. *Compare* 28 U.S.C. § 2679(d)(4). It follows no more logically from the absence of the former that agencies are immune from constitutional tort claims than it does from the absence of the latter that they are *not* immune from tort suits expressly excepted under section 2680.

Accordingly, for the reasons set out above, we find that Meyer's action against the FSLIC alleging deprivation of property without due process of law is not barred by the doctrine of sovereign immunity.

The district court's ruling on this matter is affirmed.[17]

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[17] The district court's opinion is strengthened by a final observation. "Constitutional torts" is a convenient catch-phrase, but like all catch-phrases, neither particularly accurate, nor particularly helpful. Even if all torts—whether of constitutional or common law origin—were considered cognizable under the FTCA, there is a question whether all "constitutional torts" are properly understood as torts. As the Supreme Court has noted,

> In some cases, the interests protected by a particular branch of the common law of torts may parallel closely the interests protected by a particular constitutional right .... In other cases, the interests protected by a particular constitutional right may not also be protected by an analogous branch of the common law of torts.

Carey v. *Piphus*, 435 U.S. 247, 258, 98 S.Ct. 1042, 1049, 55 L.Ed.2d 252 (1978). In the latter situation, it would seem incongruous to bar an action against a sue-and-be-sued agency

III.

We next address Meyer's claim that he was unconstitutionally deprived of his property interest without due process of law. We review this question de novo. *United States* v. *McConney*, 728 F.2d 1195,

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by invoking the FTCA when the underlying action was not a tort action at all.

Whether or not such be the case here is debatable. In *Owen* v. *City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), the Court first suggested that a constitutional claim arising out of a discharge without due process of law could be analogized to a common law action for breach of contract, *see id.* at 639 & n. 19, 100 S.Ct. at 1409 & n. 19, only to proceed to describe it as a tort action a few pages later. *See id.* at 642, 100 S.Ct. at 1411.

What we do know, however, is that the closest common law analogy to Meyer's claim is breach of an implied covenant of good faith and fair dealing, *see infra*, and that under California law, it is established that "tort remedies are not available for breach of the implied covenant in an employment contract to employees who allege they have been discharged in violation of the covenant." *Foley* v. *Interactive Data Corp.*, 47 Cal.3d 654, 700, 254 Cal.Rptr. 211, 239-40, 765 P.2d 373, 401-02 (1980). Rather, "contractual remedies should remain the sole available relief." *Id.* at 696, 254 Cal.Rptr. at 236, 765 P.2d at 398; *see also Mundy* v. *Household Finance Corp.*, 885 F.2d 542, 544 (9th Cir.1989); *Aalgaard* v. *Merchants Nat. Bank, Inc.*, 224 Cal.App.3d 674, 678 n. 1, 274 Cal.Rptr. 81, 82 n. 1 (1990). *Compare, e.g., Love v. United States*, 915 F.2d 1242, 1247 & n. 3, 1248 (9th Cir.1989) (finding that, under Montana law, the "implied covenant of good faith and fair dealing" is "recognize[d] as a separate cause of action in tort") (citing *Nicholson* v. *United Pacific Ins. Co.*, 219 Mont. 32, 710 P.2d 1342, 1348 (1985)). That Meyer's claim does not sound in tort under California law further discredits the invocation of the FTCA to bar his action.

1203 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984).

In *Board of Regents* v. *Roth*, 408 U.S. 564, 576-77, 92 S.Ct. 2701, 2708-09, 33 L.Ed.2d 548 (1972), and *Perry* v. *Sindermann*, 408 U.S. 593, 601, 92 S.Ct. 2694, 2699, 33 L.Ed.2d 570 (1972), the Supreme Court held that to have a property interest, an individual must possess an entitlement to the benefit. Entitlements are created not by the Constitution, but by "independent source(s) such as state law." 408 U.S. at 577, 92 S.Ct. at 2709. Relying on *Cleary* v. *American Airlines, Inc.*, 111 Cal.App.3d 443, 168 Cal.Rptr. 722 (1980), and *Pugh* v. *See's Candies, Inc.*, 116 Cal.App.3d 311, 171 Cal.Rptr. 917 (1981), the district court found that Meyer had stated a proper claim under state law for enjoyment of continued employment. *See also Foley*, 47 Cal.3d at 676-82, 254 Cal.Rptr. at 222-26, 765 P.2d at 384-88.[18] The terms and conditions of Meyer's em-

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[18] In *Cleary*, plaintiff had worked to the employer's satisfaction for 18 years. 111 Cal.App.3d at 447, 168 Cal.Rptr. at 724. The court stated that termination "of employment without legal cause after such a period of time offends the implied in law covenant of good faith and fair dealing contained in all contracts, including employment contracts." 111 Cal.App.3d at 455, 168 Cal.Rptr. at 729. In *Pugh*, the court found that some employers' conduct could give "rise to an implied promise that it would not act arbitrarily" in its dealing with employees. 116 Cal.App.3d at 329, 171 Cal.Rptr. at 927. In particular, the court looked at "the duration of [plaintiff's] employment, the commendations and promotions he received, the apparent lack of any direct criticism of his work, the assurances he was given, and the employer's acknowledged policies." *Id. See also Russell* v. *Mass. Mut. Life Ins. Co.*, 722 F.2d 482, 492 n. 10 (9th Cir.1983), *rev'd on other grounds*, 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985).

ployment that support his claim include his sixteen years of service for Fidelity, his frequent promotions and commendations and Fidelity's general policy of termination only upon a showing of good cause.

The FSLIC urges that, notwithstanding Fidelity's conduct, a contract for indefinite employment barring good cause was in excess of governing federal regulations. 12 C.F.R. § 563.39, in effect at the time of appellee's termination, provided that:

> An insured institution shall not enter into an employment contract with any of its officers or other employees if such contract would constitute an unsafe or unsound practice . . . [T]he making of such an employment contract would be an unsafe or unsound practice if such contract could lead to material financial loss or damage to the insured institution or could materially interfere with the exercise by the members of its board of directors of their duty of discretion provided by law, charter, bylaw or regulation as to the employment of an officer or employee of the institution. This may occur, depending upon the circumstances of the case, where an employment contract provides

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In *Foley*, the California Supreme Court disapproved of *Cleary*'s holding "to the extent that [it] permit[s] a cause of action seeking tort remedies for breach of the implied covenant." 47 Cal.3d at 700 n.42, 254 Cal.Rptr. at 240 n. 42, 765 P.2d at 401; *see also supra* at note 18. However, the type of remedy available has no bearing on the issue whether Meyer enjoyed a reasonable expectation of continued employment. *Foley* itself makes this pellucidly clear by relying extensively on *Pugh* and, specifically, on the factors the court deemed critical in that case to find an implied promise. 47 Cal.3d at 676-82, 254 Cal.Rptr. at 222-26, 765 P.2d at 384-88.

for an excessive term, or does not contain an appropriate termination for cause provision.

Cf. United States v. *Gaubert*, — U.S. —, 111 S.Ct. 1267, 1277, 113 L.Ed.2d 335 (1991) (describing the FSLIC's "broad statutory authority"). The FSLIC's argu-ment is that by virtue of 12 C.F.R. § 563.39, Meyer never enjoyed a property interest in continued employment. Because a guarantee of continued employment would be inconsistent with section 563.39, it follows that it must be considered non-enforceable.

As support for its position, the FSLIC invokes *Inglis* v. *Feinerman*, 701 F. 2d 97 (9th Cir.1983), *cert. denied*, 464 U.S. 1040, 79 L.Ed.2d 168 (1984), and *Bollow* v. *Federal Reserve Bank*, 650 F.2d 1093 (9th Cir. 1981), *cert. denied*, 455 U.S. 948, 102 S.Ct. 1449, 71 L.Ed.2d 662 (1982). In both cases, plaintiffs asserted that their employment contracts gave rise to property interests that were unconstitutionally terminated. *Inglis*, 701 F.2d at 99; *Bollow*, 650 F.2d at 1096. The court disagreed. In *Inglis*, the employer was a federal bank created under the Federal Home Loan Bank Act, 12 U.S.C. § 1421 *et seq.*, 701 F.2d at 98; in *Bollow*, it was a federal reserve bank governed by the Federal Reserve Act of 1913, 12 U.S.C. § 341, Fifth. 650 F.2d at 1097. The two relevant statutes gave the employer the power "to dismiss at pleasure" officers and employees. *Inglis*, 701 F.2d at 98; *Bollow*, 650 F.2d at 1097. Despite allegations that the bank's overall conduct and communications amounted to a promise of continued employment, the court held such purported pledges to be void and nonenforceable in light of inconsistent and controlling federal statutes. 701 F.2d at 98; 650 F.2d at 1099-100. *See also Aalgaard*, 224 Cal.App.3d 674, 274 Cal.Rptr. 81 (con-

struing in similar fashion the National Banking Act, 12 U.S.C. § 24, Fifth).

Although the analogy is seductive, it ultimately must fail. To begin with, there is no equivalent "dismissal at pleasure" language in the instant case. It is one thing to have a federal statute that grants banks the power to terminate employment contracts at will, quite another to forbid insured associations from entering into burdensome or unsafe contracts. Where the former clearly collides with a "for cause" provision, the latter, at most, qualifies it. As Meyer remarks, it is perfectly plausible that a contract contemplating dismissal only for good cause would not "constitute an unsafe or unsound practice" under 12 C.F.R. § 563.39.

More importantly, the cases cited by the FSLIC all involve federal banks created under federal statutes. Here, although governed in part by federal law, the employer was a state-chartered savings institution. Federal law, which somehow "preempted" state law claims, *see Inglis*, 701 F.2d at 98 (explaining that *Bollow* "construed [12 U.S.C. § 341 (Fifth)] as preempting employee claims of wrongful discharge based on state law"); *Aalgaard*, 224 Cal.App.3d 674, 274 Cal.Rptr. at 92 (finding that 12 U.S.C. § 24, Fifth preempted California law), does not preempt Meyer's action—nor indeed does the FSLIC claim that it does. In short, the contract allegedly created between Fidelity and Meyer cannot be voided on this ground.

The FSLIC directs its second set of arguments to the particularities of receivership law. First, it points to the broad power granted by Congress to federal receivers, citing their responsibility "to proceed to liquidate its assets in an orderly manner,

whichever shall appear to be to the best interests of the insured members of the association in default." 12 U.S.C. § 1729(b) (repealed 1989). To compel the FSLIC to conduct a hearing before exercising its authority would, it is argued, be inconsistent with congressional intent.

Second, the FSLIC contends that its actions also are expressly permitted under California law because it incorporates applicable federal law. Indeed, California Financial Code § 9103 (repealed 1983), provides that a state receiver, "shall have all the rights, privileges and powers conferred upon it by federal statutes now or hereafter enacted." *See Fidelity Savings & Loan Ass'n* v. *Federal Home Loan Bank Board*, 689 F.2d 803, 810 (9th Cir.1982) (stating that under this provision, "California law thus incorporates all federal law concerning the powers of the FSLIC as receiver"), *cert. denied*, 461 U.S. 914, 103 S.Ct. 1893, 77 L.Ed.2d 283 (1983).

Once again, the FSLIC's argument is appealing. Stated somewhat differently, the contention is that Meyer's purported entitlement to continued employment was, from its very inception, defined conditionally, limited by the prospect of Fidelity's placement in receivership. With the implicit promise came the implied caveat.

Ultimately, however, this reasoning also is flawed. The source of Meyer's property right was California common law, a history of satisfactory employment, and an understanding of fair dealing. The fact that federal and, arguably, state law conferred wide discretion to receivers to repudiate "burdensome" contracts does not, retrospectively, annul the state entitlement. In *FDIC* v. *Mallen*, 486 U.S. 230, 108

S.Ct. 1780, 100 L.Ed.2d 265 (1988), for example, the president and director of a federally insured bank was indicted on a number of charges. *Id.* at 236, 108 S.Ct. at 1785. As a result, the FDIC suspended him pursuant to 12 U.S.C. § 1818(g)(1), which authorizes precisely such action. *Id.* at 237-38, 108 S.Ct. at 1786-87. Reading the case through the FSLIC's eyes, one would be tempted to say that there had been no deprivation of a property interest, since the interest itself was contingent upon the plaintiff not being indicted—in other words, the president's entitlement to continued employment could not survive his indictment, for that would be inconsistent with the FDIC's right to dismiss under federal regulations.

The Court, however, saw it differently. Without hesitation, it found that the plaintiff's right to continue as president was "protected by the Fifth Amendment Due Process Clause," and that "the FDIC's order of suspension affected a deprivation of this property interest." *Id.* at 240, 108 S.Ct. at 1787.[19] That the suspension was foretold made it no less of a deprivation.[20]

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[19] In *Mallen*, of course, the statute did in fact give the suspended officer the right to a post-suspension hearing. It should be noted, however, that the right was given only after an initial statute that permitted suspension without a hearing had been ruled unconstitutional. *Id.* at 234, 108 S.Ct. at 1784. The point, simply, is that the existence of a provision allowing for termination or suspension in the event some occurrence were to take place does not simultaneously redefine the property interest at stake. Indictment did not trigger an interruption of constitutional protection; neither should receivership.

[20] Likewise, in ruling that a state-created entitlement to education meant that students could not be suspended on

Undoubtedly, federal receivership law reflects the urgency of the situation facing savings and loan institutions. The right given receivers to dispose expeditiously of burdensome contracts is an outgrowth of this emergency; but the weight of the federal interest goes to the question of *what*, not *whether*, process is due. The facts alleged in this case suggest that the FSLIC arbitrarily terminated some employees while retaining others. Meyer, for his part, was never given an opportunity to hear or be heard, and it was never determined—at least not openly—that keeping *him* aboard would somehow destabilize the entire crew. At a minimum, Meyer "must be given *some* kind of notice and afforded *some* kind of hearing"—"rudimentary precautions" guaranteed by the due process clause. *Goss*, 419 U.S. at 579, 581, 95 S.Ct. at 738, 740 (emphasis in original). Accordingly, we affirm the district court on this point.

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grounds of misconduct without due process, the Court in *Goss* v. *Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975), was unmoved by the existence of a state law permitting such action. In particular, the Court rejected the dissent's reasoning, reminiscent of the FSLIC's in this case:

> The Ohio statute that creates the right to a "free" education also explicitly authorizes a principal to suspend a student for as much as 10 days. Thus the very legislation which "defines" the "dimension" of the student's entitlement, while providing a right to education generally, does not establish this right free of discipline imposed in accord with Ohio law.

419 U.S. at 586-87, 95 S.Ct. at 742-43 (Powell, J., dissenting) (citation omitted).

IV.

Meyer also brought a *Bivens* action against Pattullo stemming from the alleged violation of plaintiff's Fifth Amendment rights. *See Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). While the FTCA presents no bar to Meyer's *Bivens* action, he faces a different kind of obstacle in his suit against Pattullo. An official in Pattullo's position is entitled to qualified immunity when his "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982); *see also Finkelstein* v.*Bergna*, 924 F.2d 1449, 1451 (9th Cir.1991); *Thorsted* v. *Kelly*, 858 F.2d 571, 573 (9th Cir.1988). Thus, "[t]he relevant inquiry is whether a reasonable government official could have believed that his conduct was lawful, in light of clearly established law and the information he possessed." *Thorsted*, 858 F.2d at 573 (citing *Anderson* v. *Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)).

In this case, after having received instructions from the court that were challenged by the plaintiff, the jury returned a verdict in favor of Pattullo on the grounds of qualified immunity. The court's instructions were as follows:

> The law provides government officials, such as the defendant, Robert Pattullo, with a defense of alleged violation of federal constitution and statutory law which is known as qualified immunity . . . .

The defendant, Robert Pattullo, is entitled to the defense and has asserted the defense of qualified immunity if he can establish by a preponderance of the evidence that a reasonable government official confronted with similar circumstances in this case could have been believed [sic] that his actions were lawful.

In determining whether a defendant, such as Robert Pattullo, is entitled to the defense of qualified immunity, you must consider whether the defendant could have reasonably believed that his actions were lawful in light of the defendants' official duties, the character of his official position, the facts of which he was aware, and the events which confronted him.

The reasonableness of the defendant Pattullo's belief is determined by the reasonable person's standard. It is not what the defendant Pattullo subjectively believed, but whether his belief that his actions in terminating the plaintiff were reasonable when judged by professional standards.

We begin, uncharacteristically, with substantial agreement: neither party disputes that the jury was improperly instructed. In light of controlling precedent, a proper instruction should refer *both* to the factors enumerated in this case *and* to "clearly established law." *See, e.g., Thorsted*, 858 F.2d at 573. The district court rejected plaintiff's and defendants' proposed instructions, both of which met this requirement; clearly, it was in error.[21] This, however, does not end the inquiry.

As we recently noted, the trial court has wide latitude in formulating instructions and will be reviewed for abuse of discretion only. *Benigni* v. *City of Hemet*, 879 F.2d 473, 479 (9th Cir. 1988); *Thorsted*, 858 F. 2d at 573. The reviewing court must determine "whether, considering the charge as a whole, the court's instructions fairly and adequately covered the issues presented, correctly stated the law, and were not misleading." *Thorsted*, 858 F.2d at 312. An error of instruction will not be reversed "if it is more probably than not harmless." *Benigni*, 879 F.2d at 479; *see also Kisor* v. *Johns-Mansville Corp.*, 783 F.2d 1337, 1340 (9th Cir. 1986) ("We must consider whether the instruction . . . [is] to the prejudice of the objecting party").

We conclude that the error in this case was non-prejudicial based on our finding that, as a matter of law, " 'the facts alleged . . . [do not] support a claim of violation of clearly established law.' " *Vaughan* v. *Ricketts*, 859 F.2d 736, 739 (9th Cir.1988) (quoting *Mitchell* v. *Forsyth*, 472 U.S. 511, 528 n. 9, 105 S.Ct. 2806, 2816 n. 9, 86 L.Ed.2d 411 (1985)), *cert. denied*, 490 U.S. 1012, 109 S.Ct. 1655, 104 L.Ed.2d 169 (1989). Although we believe Meyer's claim has merit, *see*

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[21] Arguably, the district court's decision to submit the question of qualified immunity to the jury means that it "necessarily found that the legal rules were clearly established in this area." *Brady* v. *Gebbie*, 859 F.2d 1543, 1556 (9th Cir. 1988), *cert. denied*, 489 U.S. 1100, 109 S.Ct. 1577, 103 L.Ed.2d 943 (1989). The court's conviction is not the issue, however; rather, it is the propriety of its explanation of the law to the jurors.

supra Part III, "a reasonable officer . . . could have believed his actions toward (Meyer) were constitutional even if they were not." *Wood* v. *Ostrander*, 879 F.2d 583, 591 (9th Cir.1989), *cert. denied*, — U.S. —, 111 S.Ct. 341, 112 L.Ed.2d 305 (1990).[22]

Rules governing federally insured institutions and federal receivership make for treacherous law.

[22] It will not suffice to say, as plaintiff does, that *Roth* and *Perry* had clearly established the applicable law some 19 years ago. The heart of the problem, no doubt, lies in the "level of generality at which the relevant 'legal rule' is to be identified." *Anderson*, 483 U.S. at 639, 107 S.Ct. at 3038-39; see also *Schlegel* v. *Bebout*, 841 F.2d 937, 944 (9th Cir. 1988). As the level narrows, so too diminishes the likelihood that the official will be vulnerable to suit. Predictably, Meyer chooses to define the legal rule in as broad a manner as possible, evoking the right not to "be deprived of a constitutionally protected property interest until and unless he is afforded a due process hearing." Conversely, and just as predictably, Pattullo focuses on the narrowest possible definition, describing "FSLIC's termination of employees of a failed financial institution pursuant to takeover or liquidation" and "federal receivership law."

Because we find that a federal employee could reasonably have believed in the lawfulness of the actions at issue, we need not decide between these conflicting definitions. Still, we are mindful of the Supreme Court's admonition that

> the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right . . . . But if a test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*.

Anderson, 483 U.S. at 639, 107 S.Ct. at 3039.

Indeed, the district court went so far as to reverse itself, initially finding that Meyer did not have a legitimate expectation of continued employment. In order to be clearly established,

> [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent.

Anderson, 483 U.S. at 640, 107 S.Ct. at 3039 (citation omitted); *see also F.E. Trotter, Inc.* v. *Watkins*, 869 F.2d 1312, 1315 (9th Cir.1989); *Brady*, 859 F.2d at 1556. In light of the complex nature of Meyer's entitlement, reflected in both the district court's and our own examination of the issue, we are unable to say that *Anderson's* standard has been met. The issue of qualified immunity should not have been submitted to the jury because Pattullo violated no *clearly established law. See Schwartzman* v. *Valenzuela*, 846 F.2d 1209, 1211 (9th Cir.1988) (question of clearly established right is question of law). Thus, any error in the qualified immunity instruction was harmless.

V.

Finally, Meyer contends that the district court erred by excluding expert testimony regarding the state of the law. A court's decision to exclude evidence is reviewed for abuse of discretion. *Ignacio* v. *People of the Territory of Guam*, 413 F.2d 513, 520

(9th Cir. 1969), *cert. denied*, 397 U.S. 943, 90 S.Ct. 959, 25 L.Ed.2d 124 (1970).

On numerous past occasions, this court has "condemned the practice of attempting to introduce law as evidence." *United States* v. *Unruh*, 855 F.2d 1363, 1376 (9th Cir. 1987), *cert. denied*, 488 U.S. 974, 109 S.Ct. 513, 102 L. Ed.2d 548 (1988). Indeed, "[i]t is not for witnesses to instruct the jury as to applicable principles of law, but for the judge." *Marx & Co., Inc.* v. *Diners' Club, Inc.*, 550 F.2d 505, 509-10 (2d Cir.), *cert denied*, 434 U.S. 861, 98 S.Ct. 188, 54 L.Ed.2d 134 (1977). If judges are advised to reject expert testimony on legal matters, surely it cannot be reversible error when they do so.

CONCLUSION

There are, essentially, two threshold matters in this case: the first is the FSLIC's immunity, and the second, Pattullo's. For the foregoing reasons, the district court's disposition on both issues is hereby

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 89-16695 and No. 90-15025
USDC No. CV 83-2204-JPV

JOHN H. MEYER, PLAINTIFF/APPELLANT
CROSS-APPELLEE

v.

FIDELITY SAVINGS, ET AL. DEFENDANTS
AND FEDERAL SAVINGS
AND
LOAN INSURANCE CORPORATION,
DEFENDANT-APPELLEE/CROSS-APPELLANT

[Filed June 29, 1992]

ORDER

BEFORE: TANG, FARRIS, AND D.W. NELSON, CIRCUIT JUDGES

The members of this panel that decided this case voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has

requested a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

STATUTORY PROVISIONS

1. 28 U.S.C. 1346(b) provides:

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2. 28 U.S.C. 2679(a) provides:

The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

3. 28 U.S.C. 2680 provides, in pertinent part:

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or

not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * * * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

4. 12 U.S.C. 1725(c) (1982) provided, in pertinent part:

On June 27, 1934, the [Federal Savings and Loan Insurance] Corporation shall become a body corporate, and shall be an instrumentality of the United States, and as such shall have power—

* * * * *

(4) To sue and be sued, complain and defend, in any court of competent jurisdiction in the United States or its Territories or possessions or the Commonwealth of Puerto Rico, and may be served by serving a copy of process on any of its agents or any agent of the Federal Home Loan Bank Board and mailing a copy of such process by registered mail or by certified mail to the Corporation at Washington, District of Columbia.